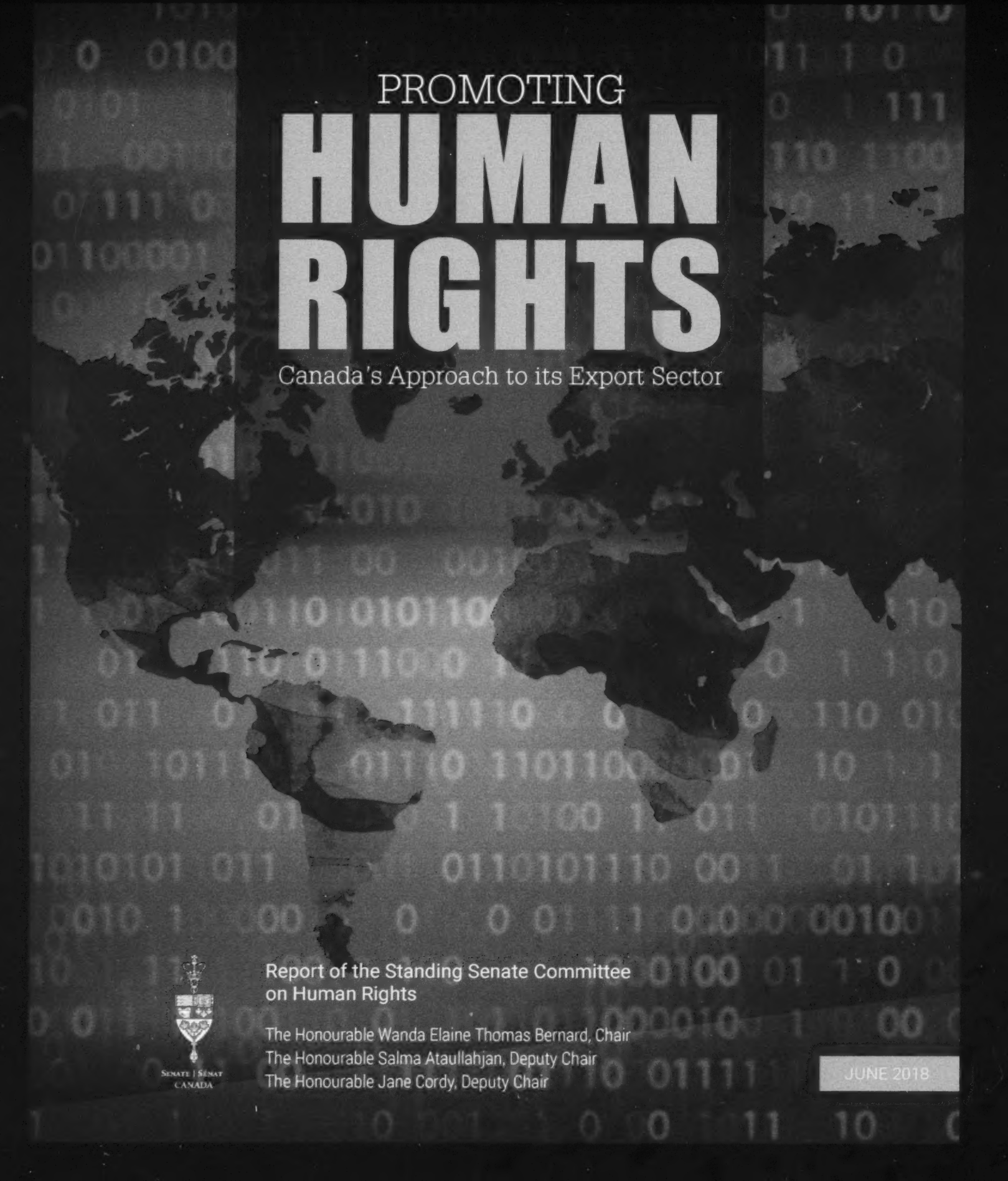

PROMOTING HUMAN RIGHTS

Canada's Approach to its Export Sector

Report of the Standing Senate Committee on Human Rights

The Honourable Wanda Elaine Thomas Bernard, Chair
The Honourable Salma Ataullahjan, Deputy Chair
The Honourable Jane Cordy, Deputy Chair

SENATE | SÉNAT CANADA

JUNE 2018

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COMMITTEE MEMBERSHIP

The Honourable Wanda Thomas Bernard, Chair
The Honourable Salma Ataullahjan, Deputy Chair
The Honourable Jane Cordy, Deputy Chair

and

The Honourable Senators

Raynell Andreychuk
Patrick Brazeau
Nancy Hartling
Yonah Martin
Thanh Hai Ngo
Kim Pate

Ex-officio members of the committee:

The Honourable Senators Peter Harder, P.C. (or Diane Bellemare or Grant Mitchell), Larry Smith (or Yonah Martin), Joseph Day (or Terry Mercer), and Yuen Pau Woo (or Raymonde Saint-Germain)

Other Senators who have participated from time to time in the study:

The Honourable Senators Nicole Eaton, Raymonde Gagné, Elizabeth Hubley, Marilou McPhedran, Jim Munson, Nancy Ruth and Ratna Omidvar

Parliamentary Information and Research Service, Library of Parliament:

Erin Shaw and Jean-Philippe Duguay, Analysts

Senate Committees Directorate:

Joëlle Nadeau, Clerk of the Committee
Mark Palmer, Clerk of the Committee
Elda Donnelly, Administrative Assistant

Senate Communications Directorate:

Síofra McAllister, Communications Officer

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Wednesday, February 3, 2016:

The Honourable Senator Munson moved, seconded by the Honourable Senator Hubley:

That the Standing Senate Committee on Human Rights be authorized to examine and monitor issues relating to human rights and, inter alia, to review the machinery of government dealing with Canada's international and national human rights obligations;

That the papers and evidence received and taken and work accomplished by the committee on this subject since the beginning of the First Session of the Thirty-seventh Parliament be referred to the committee; and

That the committee submit its final report to the Senate no later than January 31, 2017.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

ORDER OF REFERENCE

Extract from the Journals of the Senate of Tuesday, March 28, 2017:

The Honourable Senator Munson moved, seconded by the Honourable Senator Jaffer:

That the Standing Senate Committee on Human Rights be authorized to examine and monitor issues relating to human rights and, inter alia, to review the machinery of government dealing with Canada's international and national human rights obligations;

That the papers and evidence received and taken and work accomplished by the committee on this subject since the beginning of the First Session of the Thirty-seventh Parliament be referred to the committee; and

That the committee submit its final report to the Senate no later than March 31, 2018.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, March 22, 2018:

> The Honourable Senator Bernard moved, seconded by the Honourable Senator Dupuis:
>
> > That, notwithstanding the order of the Senate adopted on Tuesday, March 28, 2017, the date for the final report of the Standing Senate Committee on Human Rights in relation to its study on issues relating to human rights and, inter alia, to review the machinery of government dealing with Canada's international and national human right obligations be extended from March 31, 2018 to October 31, 2019.
>
> The question being put on the motion, it was adopted.

Richard Denis
Clerk of the Senate

LIST OF ABBREVIATIONS

ACL
Area Control List

ATT
United Nations Arms Trade Treaty

ECL
Export Control List

EDC
Export Development Canada

EIPA
Export and Import Permits Act

LAV
Light Armoured Vehicles

EXECUTIVE SUMMARY

Canada is committed to the protection of human rights at home and abroad. With this aim, it has made a range of international and domestic commitments, and works closely with like-minded states to advance respect for human rights. National laws and regulations, including the *Export and Import Permits Act* (EIPA), also aim to prevent Canada and Canadians from contributing to serious violations of internationally recognized human rights or serious violations of international humanitarian law abroad.

It is with this in mind that the Standing Senate Committee on Human Rights undertook a study to examine available economic levers that can be used to enhance respect for human rights, with particular focus on the EIPA.

The EIPA is Canada's primary tool for managing the import and export of goods and technologies.[1] It authorizes the Governor in Council to control exports by listing controlled goods and technologies in regulations.[2] To export listed goods and technologies, companies are required to apply to the Minister of Foreign Affairs for an export permit.[3] The risks associated with exporting such goods or technologies are reviewed as part of the permit application process. Depending on the circumstances, this review may consider whether the specific exports could be used by "countries whose governments have a persistent record of serious violations of the human rights of their citizens, unless it can be demonstrated that there is no reasonable risk that the goods might be used against the civilian population."[4]

The EIPA and Global Affairs Canada policies give the Minister of Foreign Affairs broad discretion to weigh the potential for human rights violations against various other foreign policy, defence and commercial considerations.[5]

The committee is concerned that Canada continues to allow the export of goods and technologies where there is a risk the exports could be used to commit or facilitate serious violations of internationally recognized human rights or international humanitarian law.[6] The

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1 *Export and Import Permits Act* (EIPA), R.S.C. 1985, c. E-19.

2 Ibid., s. 3(1).

3 Ibid., s. 7.

4 Department of External Affairs, "Export Controls Policy," No, 155, 10 September 1986, p. 2; Global Affairs Canada, *Export Controls Handbook*, August 2017.

5 EIPA, s. 7(1.01).

6 The *Arms Trade Treaty* (ATT), among other obligations, requires exporting states parties to take steps to assess the potential that conventional arms exports could be used to "commit or facilitate a serious violation" of international human rights law or international humanitarian law and to refuse to authorize an export if an assessment determines that there is an "overriding risk" that such violations could occur (art. 7(1)(b)(i)-(ii), 7(3)). Canada has indicated that it intends to accede to this treaty and the Minister of Foreign Affairs has introduced legislation that is intended to bring Canadian law into compliance with the ATT (Bill C-47, An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments), 1st Session, 42nd Parliament).

committee is also concerned about the risk that Canadian goods or technologies could be used by non-state actors to seriously abuse the internationally recognized human rights of others.[7]

Respect for internationally recognized human rights and international humanitarian law — including access to effective remedies — is an important component of human security. The committee found that even though the Government of Canada advocates for the protection of human security abroad, it too often appears willing to compromise its values in order to advance economic and other foreign policy interests. In examples presented to the committee, this compromise was not always evidently warranted or justified. Not only is the Government of Canada failing to take a leadership role in this area, but some Crown corporations have actively supported businesses that have exported Canadian goods and technologies to countries with poor human rights records, which risk being used to commit or facilitate serious violations or abuses of internationally recognized human rights or international humanitarian law abroad.

The committee is of the opinion that the Government of Canada's actions on human rights and international humanitarian law must be more consistent with its messaging. To that end, the committee identified a number of areas that could be improved to strengthen and update Canada's export regime to ensure that Canadian goods and technologies are not being used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law abroad, these include:

- The Export and Import Permits Act should be amended to require consideration of internationally recognized human rights and international humanitarian law in the export permit process.
- Stakeholders, including civil society and academics, should contribute to the development and use of human rights and international humanitarian law assessment tools under the Export Control List in the Export and Import Permits Act.
- The Government of Canada, in cooperation with industry representatives, civil society organizations and academia, should explore ways to better track the end-uses and end-users of Canadian goods and technologies with the goal of preventing Canadian goods and technologies from being used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law.

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7 The extent to which non-state actors have human rights obligations is a matter of debate in international law. Therefore, in this report, the term human rights "abuses" is intended to ensure that the Committee's findings, conclusions and recommendations encompass problematic actions by states and by non-state actors. It is not intended to refer to a different standard of conduct. In contrast, both states and non-state armed groups clearly have legal obligations under international humanitarian law. Therefore, the term "violations" is used to refer to the actions of both state and non-state actors in this context.

- The Export and Import Permits Act export permit regime should be updated by introducing export controls for new and emerging technologies that could be used to violate or abuse internationally recognized human rights or to violate international humanitarian law. The focus of these controls should be on end-uses and end-users, rather than on categories of goods or technology.
- Global Affairs Canada should consider how to enhance transparency for the export of new and emerging technologies that could be used to commit or facilitate serious violations or abuses of internationally recognized human rights, or serious violations of international humanitarian law.
- Canadian Crown Corporations should ensure their export business practices comply with the United Nations Guiding Principles on Business and Human Rights.[8] The Government of Canada, in cooperation with provincial and territorial governments, should take concrete steps to persuade Canadian exporters and financial institutions to do the same.
- The Export Development Act should be amended to require Export Development Canada to consider the risk that the goods, technologies and their associated services that are the subject of a transaction could be used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law.
- Export Development Canada should be required to update Parliament annually on its human rights and international humanitarian law risk assessments as part of its existing reporting obligations.

Canada, as a protector of internationally recognized human rights and international humanitarian law domestically and abroad, must translate these words into actions. Clear, transparent and objective standards are needed to assess the risk that exports may be used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law. Peace, security and human rights are interlinked and mutually reinforcing. Larger foreign policy, defence, and trade considerations should not diminish the importance of internationally recognized human rights or international humanitarian law considerations once it has been established that substantial risks exist. Moreover, commercial gains for Canadians should not come at the expense of the human rights of others. The Government of Canada should be more proactive in its efforts to ensure that Canadian strategic and military goods, services and technologies are not used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law abroad.

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[8] United Nations *Guiding Principles on Business and Human Rights*, endorsed by the United Nations Human Rights Council in "Resolution 17/4 on Human Rights and transnational corporations and other business enterprises," 6 July 2011, UN Doc. A/HRC/Res/17/4 [UN Guiding Principles on Business and Human Rights or Guiding Principles]. The Guiding Principles were developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and presented to the Human Rights Council in his final report of 21 March 2011, UN Doc. A/HRC/17/31.

INTRODUCTION

In the spring of 2016, the Standing Senate Committee on Human Rights (the committee) agreed to study how Global Affairs Canada considers human rights in its assessment of export permit applications. The committee conducted the study under its general order of reference: To study issues relating to human rights and, inter alia, to review the machinery of government dealing with Canada's international and national human rights obligations. It held five meetings, hearing from 11 witnesses, and received written submissions.

The committee began its study shortly after stories appeared in the news indicating that the Minister of Foreign Affairs approved General Dynamics Land Systems Canada's (General Dynamics) application to export light armoured vehicles (LAVs) to the Kingdom of Saudi Arabia. A considerable amount of the testimony centred on this series of export permits, in light of Saudi Arabia's poor human rights record and its military involvement in Bahrain and Yemen. The contract between General Dynamics and Saudi Arabia was valued at $14.8 billion and spans over a 14-year period.[9] The committee notes that between 1993 and 2015, Canada granted General Dynamics permits to export over 2,900 LAVs, associated weapons systems and spare parts to Saudi Arabia.[10]

As this study progressed, concerns surfaced around the export of new and emerging technologies, such as Internet filtering software. The committee heard that Canadian technologies have been exported to authoritarian regimes that are using them to suppress the rights of their citizens.

The Government of Canada controls the import and export of certain goods and technologies, especially those of military and strategic value. In the committee's view, Canadian export controls need to be updated to keep pace with technological change and evolving norms related to international human rights and armed conflict. Our country's export controls must be more effective in preventing Canadian goods and technologies from being used by state actors to commit or facilitate serious violations of internationally recognized human rights. Similarly, export controls need to account for the possibility that Canadian goods, technologies and their associated services could be used by non-state actors to seriously infringe on the internationally recognized human rights of others – or to

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9 Standing Senate Committee on Human Rights, *Evidence*, 1st Session, 42nd Parliament, 8 June 2016 (Wendy Gilmour, Director General, Trade Controls Bureau, Global Affairs Canada); Standing Senate Committee on Human Rights, *Evidence*, 1st Session, 42nd Parliament, 1 June 2016 (Cesar Jaramillo, Executive Director, Project Ploughshares).

10 Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016, para. 3 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

put it simply – to abuse human rights.[11] In addition, where there is an armed conflict, export controls must be sufficiently robust to guard against the possibility that Canadian exports could be used to commit or facilitate serious violations of international humanitarian law.

The committee notes the term "serious violations of international humanitarian law" includes grave breaches of the four Geneva Conventions of 1949, serious breaches of Common Article 3 to those conventions and Additional Protocol I to those conventions, the war crimes prohibited under the Rome Statute of the International Criminal Court and other war crimes defined under customary international law.[12]

What constitutes a serious violation (or abuse) of international human rights law is constantly evolving. The scope, the consequences for victims, the intent, and the shocking effect of the potential violation or abuse in question could be relevant to determining the seriousness of a violation or abuse.[13] For example, broad-scale internet filtering, as well as the persistent targeting and/or prosecution of individuals for on-line expressions of dissent may constitute serious human rights violations or abuses. Similarly, the use of Canadian exports to provide essential support to a military or civilian operation that has the repression of peaceful dissent as its primary objective could also constitute a serious human rights violation or abuse, even if the specific exports themselves are not used in the direct commission of violations or abuses.

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11 Only states have human rights obligations under international law; therefore, only states can commit human rights "violations." The term "abuses," as used by the Committee, is not intended to refer to a different standard of conduct; rather, it is intended to ensure that the Committee's findings, conclusions and recommendations encompass problematic actions by states and by non-state actors. In contrast, both states and non-state armed groups have legal obligations under international humanitarian law. Therefore, the Committee has used the term "violations" to refer to the actions of both state and non-state actors in this context.

12 Canada is party to each treaty and these violations of international humanitarian law have been incorporated into Canadian law as offences under the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 3(1) and the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 4, 6. *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, arts. 3, 50 [First Geneva Convention of 1949]; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, arts. 3, 51 [Second Geneva Convention of 1949]; *Convention (III) relative to the Treatment of Prisoners of War*, arts. 3, 130 [Third Geneva Convention of 1949]; and *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, arts. 3, 147 [Fourth Geneva Convention of 1949]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* [Additional Protocol I], 8 June 1977, arts. 11, 85. For a discussion, see: International Committee of the Red Cross, *Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty*, November 2013 and Stuart Casey-Maslen, Andrew Clapham, Gilles Giacca and Sarah Parker, *The Arms Trade Treaty: A Commentary*, Oxford University Press, 2016, paras. 7.39 – 7.49.

13 See the discussion in Casey-Maslen et al., ibid., paras 750-782, esp. para 7.79 and Takhmina Karimova, *What amounts to 'a serious violation of international human rights law'? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*, Geneva Academy of International Humanitarian Law and Human Rights, 2014.

An analysis of the seriousness of human rights violations and abuses also needs to consider whether effective remedies exist when serious violations do occur. Ensuring the availability and accessibility of effective remedies is a critical obligation of states under both international human rights law and international humanitarian law. The concept of effective remedies includes access for victims to independent and impartial courts and administrative tribunals; the exercise of responsible military command (i.e., superior officers must prevent or punish unlawful acts by their subordinates); and, an obligation for states to ensure that non-state actors respect human rights through the use of appropriate accountability tools – for example, effective and independent criminal investigations and prosecutions.[14] The concerns raised in this report, therefore, are aimed at exports to locations where there is a record of persistent violations of internationally recognized human rights or violations of international humanitarian law and an absence of effective remedies.

As a nation that takes human security seriously, Canada has undertaken a wide variety of international human rights and international humanitarian law obligations and has also committed to upholding non-binding human rights standards. The promotion and protection of internationally recognized human rights and international humanitarian law is also an important component of Canadian foreign policy.

This report is divided into three parts. The first part assesses how human rights and humanitarian law risks are considered within Canada's export permit application assessment process for items on the Export Control List (ECL) of the Export and Import Permits Act (EIPA). The second part of the report considers how the export control process applies to new and emerging technologies that could be used to commit or facilitate serious violations or abuses of internationally recognized human rights or serious violations of international humanitarian law. The third part reviews ongoing developments related to Canada's export control regime. The report concludes by making a number of recommendations to strengthen and update Canada's export control regime with a view to

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14 See, e.g.: *International Covenant on Civil and Political Rights*, art. 2, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, arts. 4, 7 - 16 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by United Nations General Assembly Resolution 60/147, 16 December 2005; First Geneva Convention of 1949, arts. 1, 3 49, 51, 52; Second Geneva Convention of 1949, arts. 1, 3, 50, 52, 53; Third Geneva Convention of 1949, arts. 1, 3, 146, 148, 149; Fourth Geneva Convention of 1949, arts. 1, 3, 129, 131, 132; Additional Protocol I, arts. 1, 85 – 91; *Rome Statute of the International Criminal Court*. Canada is party to each treaty listed above. Grave breaches of the Geneva Conventions have been incorporated into Canadian law as offences under the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 3(1). Violations of international humanitarian law, genocide and crimes against humanity are punishable in Canada under the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 4, 6. Torture is also a crime under the *Criminal Code*, R.S.C., 1985, c. C-46, and statements obtained by torture are inadmissible (in all proceedings over which the federal Parliament has jurisdiction) except as evidence that the statement was so obtained (s. 269.1).

ensuring that Canadian goods and technologies are not used to undermine human security abroad.

PART 1: Human Rights and the Export and Import Permits Act

A. The Export Control Framework

The Export and Import Permits Act was enacted following the end of the Second World War, on 14 May 1947 principally to deal with "world shortages and the consequent international allocation of some commodities," but also to control "the movement of arms, munitions and war materials and supplies."[15] The list of controlled goods was to be set out in regulations. The original version of the Act contained 15 clauses, one of which stated that the Act would "expire sixty days from the commencement of the first session of Parliament commencing the year one thousand nine hundred and forty-eight."16 The EIPA has evolved significantly since that time and the sunset clause has been repealed. While the Act still controls Canadian imports and exports, the focus has expanded to include Canada's broader trade, defence and foreign policy interests.

The EIPA requires Canadian companies to apply for an export permit to export specified goods and technologies from Canada. Goods and technologies that require an export permit are listed on the Export Control List (ECL) of the EIPA.[17] According to Global Affairs Canada, "[t]he principle objective of export controls is to ensure that exports of certain goods and technologies are consistent with Canada's foreign and defence policies."[18] Wendy Gilmour, Director General, Trade Controls Bureau, Global Affairs Canada explained that:

> the Export Control List comprises goods and technologies of strategic value to Canada. The vast majority of items is listed following negotiation with allies and partners in four multilateral export control regimes or listed as a result of bilateral agreements. Maintaining consistency between Canada's Export Control List and those of our allies and partners allows exporting Canadian defence and security companies to operate on a level playing field with their international competitors. Issuing or denying export permits, however, remains a strictly national decision.[19]

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15 House of Commons Debates, 20th Parliament, 3rd Session: Vol. 1, p. 568.
16 House of Commons Debates, 20th Parliament, 3rd Session: Vol. 3, p. 2037.
17 EIPA, *Export Control List*, SOR/89-202.
18 Global Affairs Canada, *Export Controls Handbook*, August 2017.
19 *Evidence*, 8 June 2016 (Gilmour).

The EIPA also includes an Area Control List (ACL).[20] Permits are required for all exports of goods and technology to countries on this list.[21] Currently, North Korea is the only country on the ACL.

Under the EIPA, the Prime Minister and Cabinet (the Governor in Council) are responsible for adding goods and technologies to the Export Control List.[22] The Minister of Foreign Affairs then determines whether to issue an export permit for the listed goods and technologies.[23] In practice, the committee was informed that most export permit applications are approved through a process administered by Global Affairs Canada. Only certain permit applications will be brought to the personal attention of the Minister of Foreign Affairs for a decision.[24]

B. Human Rights and Humanitarian Law Considerations in the Export Permit Process

Under the EIPA, the Minister of Foreign Affairs has "discretion to consider a broad range of factors in determining whether or not to issue a permit" for the export of goods listed on the ECL.[25] Assessments are performed "on a case-by-case basis specific to the risks that correspond to the goods or technology specified in the application and the identified end use and end-user."[26]

As part of the current export application process for controlled military and strategic goods and technologies, exporters are required to submit statements about the end-use of their products. According to the Export Controls Handbook, this documentation normally would be in the form of an end-use certificate issued by the government of the country of final destination, or in the form of an end-use statement, if an official document cannot be obtained from the government of the country of final destination. An end-use certificate usually "describes the end-use of the items in that country; [and] confirms that the government of that country accepts responsibility to ensure that the items will not be diverted to uses other than those stated."[27] An end-use statement normally identifies the "end-user and the locations where the items will be delivered" and "states the purpose and end-use of the products, including a statement of whether the intended end-use of the items is civilian (commercial) or military."[28] The Export Control Handbook also states:

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20 EIPA, *Area Control List*, SOR/81-543.
21 EIPA, s. 4.
22 EIPA, s. 3 (1).
23 EIPA, s. 7 (1).
24 *Evidence*, 8 June 2016 (Gilmour).
25 *Evidence*, 8 June 2016 (Gilmour).
26 *Evidence*, 8 June 2016 (Gilmour).
27 GAC, *Export Controls Handbook*, August 2017.
28 Ibid., p. 48.

> it is expected that Canadian exporters of controlled goods and technology will make appropriate enquiries as to the intended end-use of the export and to fully declare this end-use when making an application. In other words, an applicant/exporter should exercise due diligence and know who the foreign parties are, including the end-users.[29]

According to Global Affairs Canada's 2016 report on exports of military goods, "[c]areful attention is paid to end-use documentation in an effort to ensure that the export is intended for a legitimate end-user and will not be diverted to ends that could threaten the security of Canada, its allies, other countries or civilians.[30] Policy guidelines that were issued by Cabinet in 1986 are still used in the context of export permit assessments for military and strategic goods and technologies. Among other things, the policy states that Canada will closely control the export of military items to:

> Countries involved in or under imminent threat of hostilities; and
>
> Countries whose governments have a persistent record of serious violations of the human rights of their citizens, unless it can be demonstrated that there is no reasonable risk that the goods might be used against the civilian population.[31]

The policy indicates that a confidential list of such countries will be maintained and regularly reviewed by the Minister of Foreign Affairs.[32] It also indicates that:

> Export proposals for military goods to certain countries will trigger an automatic inter- and intra-departmental consultation process. Human rights will be considered by all officials involved in the consultation process. Ministers would be made aware of the results of this process and would personally consider any exceptions to the guidelines.[33]

Departmental officials indicated to the committee that further policy direction has also been established since 1986 to ensure that Canadian exports are not used to commit human rights violations. The focus of the assessment is on "the risk related to violations of international human rights law, violations of international humanitarian law, [and] the risk of diversion to an unauthorized use. All of these elements are taken into account specific to the good or technology being exported."[34]

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29 Ibid., p. 32.
30 GAC, *Exports of Military Goods 2016*, August 2017.
31 Department of External Affairs, "Export Controls Policy," No, 155, 10 September 1986, p. 2; Global Affairs Canada, *Export Controls Handbook*, August 2017.
32 According to the policy, this list would be a Cabinet confidence.
33 Department of External Affairs, "Export Controls Policy," Communiqué, 10 September 1986.
34 *Evidence*, 8 June 2016 (Gilmour).

Global Affairs Canada explained that if:

> [c]oncerns persist regarding the potential that the proposed export could contribute to serious violations of human rights, the [export permit] assessment includes an examination of any mitigating factors, which include Canada's overall foreign policy, defence and security interests. This assessment is presented to the minister for his decision on whether or not to authorize a permit.
>
> If there were residual concerns that could not be mitigated by the positive benefits of a particular export, the strong likelihood would be that the minister would probably choose not to authorize a permit.[35]

Illustrating the application of this approach, Ms. Gilmour, informed the committee that in respect of the approval of the most recent export permits for General Dynamics to export light armoured vehicles (LAVs) to the Kingdom of Saudi Arabia, under a contract negotiated with the Canadian Commercial Corporation, Global Affairs Canada had no information to indicate that these vehicles have been used inappropriately or to commit human rights violations [in the past]. On balance, given the larger strategic environment, it was consistent with Canada's foreign policy, defence and security interests, including human rights, for the minister to authorize this export.[36]

A more detailed consideration of the relevant factors is contained in a memorandum presented to the Minister of Foreign Affairs in respect of the decision to issue an export permit in relation to this sale. It states that export permit applications under the ECL will be assessed against human rights concerns to determine "whether the nature of the goods or technology proposed for export lends itself to human rights violations, and whether there is a reasonable risk that the goods might be used against the civilian population." [37]

After reviewing various allegations of human rights violations by the Saudi Arabian government, the memorandum indicates that "Canada has sold thousands of LAVs to Saudi Arabia since the 1990s and, to the best of the Department's knowledge, there have been no incidents where they have been used in the perpetration of human rights violations." Officials, therefore, did not "believe that the proposed exports would be used to violate human rights" and concluded that they had "no concerns" with the export application.[38] Noting that questions had been raised by journalists with respect to the possible role of

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35 *Evidence*, 8 June 2016 (Gilmour).

36 *Evidence*, 8 June 2016 (Gilmour).

37 Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

38 Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

Canadian LAVs during "upheavals" in Bahrain in 2011,[39] the memorandum indicates that Saudi Arabia provided "support" to Bahrain during "these events" and "[t]o the best of the Department's knowledge, Saudi troops were stationed to protect key buildings and infrastructure, and did not engage in suppression of peaceful protests."[40] In addition, after reviewing information regarding violations of international human rights law and international humanitarian law by Saudi Arabian forces in the context of the armed conflict in Yemen, as well as mitigating information and measures taken by Saudi Arabia in that armed conflict, officials added that "[t]here has been no indication that equipment of Canadian origin, including LAVs, may have been used in acts contrary to international humanitarian law."[41]

Global Affairs Canada also informed the committee that Canada's existing defence relationship with Saudi Arabia was factored in its consideration of the export permits application.[42] Ministerial briefing materials indicate that officials at the department also drew the Minister's attention to broader foreign policy considerations in the Middle East and the economic benefits that the construction of the LAVs would bring within Canada.[43]

The appropriate standard of review and the weight to be given to human rights concerns in the export permit assessment process was a source of disagreement among witnesses. Cesar Jaramillo, Executive Director of Project Ploughshares, for example, argued that the "reasonable risk" standard in the 1986 policy was not properly applied when the export permit was issued for the LAVs sold to Saudi Arabia. In his view, the "reasonable risk" standard does not call for "a retroactive, rearview mirror assessment" of whether the exports in question have in the past been used to violate human rights, "but rather, looking forward" whether there is a "reasonable risk that they might be" so used.[44] He stressed that the current "reasonable risk" standard should not require "certainty," nor should it require "evidence" that the goods or technology would be misused. In his view, if a "reasonable risk" of human rights violations is established, the Minister of Foreign Affairs should not authorize an export based on the importance of other foreign policy, defence or trade considerations.

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39 Large-scale protests erupted in Bahrain in February and March 2011, as part of the Arab Spring, which toppled dictators across the Middle East. The protests in Bahrain became violent and an independent commission of inquiry appointed by the King of Bahrain found that the Bahraini security forces committed significant violations of internationally protected human rights in repressing the unrest: *Report of the Bahrain Independent Commission of Inquiry*, 2011.

40 Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

41 Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

42 *Evidence*, 8 June 2016 (Gilmour).

43 Global Affairs Canada, "Record of the decision of the Minister of Foreign Affairs to approve permits for the export of light armoured vehicles to Saudi Arabia;" Global Affairs Canada, "Memorandum for Action to the Minister of Foreign Affairs," 21 March 2016 (see Appendix 2) [OFFICIAL VERSION AVAILABLE IN ENGLISH ONLY].

44 *Evidence*, 1 June 2016 (Jaramillo).

Drawing on the example of this particular export permit, other witnesses expressed a number of concerns with the current export permit assessment process under the ECL and made suggestions for improvement. Following up on the argument that insufficient weight was attached to the consideration of human rights and international humanitarian law in the departmental assessment of export permit applications, Ken Epps, Policy Advisor, Project Ploughshares and Sheryl Saperia, Director of Policy (Canada), Foundation for Defense of Democracies, suggested that the EIPA could be amended to specifically include human rights risks, which would give the consideration of human rights greater weight when determining whether to issue an export permit.[45] Ms. Saperia pointed out that the United States could serve as a good model for Canada: "The [US export control] regulations specifically state that the judicious use of export controls is intended to deter the development of a consistent pattern of human rights abuses, distance the United States from such abuses and avoid contributing to civil disorder in a country or region."[46]

At present, the EIPA indicates only that one of the purposes of the ECL is to ensure that military and strategic goods and technologies are not made available to destinations where their use might harm the security of Canada.[47] The Act gives the Minister of Foreign Affairs discretion to consider whether the goods or technology in question may be used for purposes prejudicial to the safety or interests of Canada, or to the peace, security or stability of any country or region of the world, in addition to "any other matter that the Minister may consider."[48] Under the 1986 guidelines, Global Affairs Canada will consider human rights and international humanitarian law in its assessment, but the Minister retains broad discretion to approve exports.[49]

While the committee recognizes the importance of ministerial discretion in matters of international affairs, it is of the opinion that internationally recognized human rights and international humanitarian law should be given greater weight in the assessment process. In particular, such considerations should carry great weight in situations of armed conflict or where state or non-state actors in the country of final destination have a record of serious violations or abuses of internationally recognized human rights. Moreover, these risks should be assessed against a transparent and objective standard embedded in the Export and Import Permits Act. This international humanitarian law and human rights review should apply to exports of conventional weapons and dual-use goods or technologies, as well as the types of new and emerging technologies that pose human

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45 Standing Senate Committee on Human Rights, *Evidence*, 1st Session, 42nd Parliament, 15 June 2016 (Sheryl Saperia, Director of Policy, Canada, Foundation for Defense of Democracies); *Evidence*, 1st Session, 42nd Parliament, 1 June 2016 (Ken Epps a Policy Advisor, Project Ploughshares, as an individual).

46 *Evidence*, 15 June 2016 (Saperia).

47 EIPA, s. 3(1)(a).

48 EIPA, s. 7(1.01). Section 3(1)(a)—(n) of the *Security of Information Act*, R.S.C., 1985, c. O-5, sets out purposes that are "prejudicial to the safety or interests of the State."

49 *Evidence*, 1 June 2016 (Jaramillo); *Evidence*, 1 June 2016 (Epps); *Evidence*, 15 June 2016 (Saperia).

rights or humanitarian law risks discussed in Part 2 of this report. Where there is a substantial risk that exports could be misused to commit or facilitate serious violations or abuses of internationally recognized human rights, or serious violations of international humanitarian law, an export permit should be denied. Canada should not compromise human security for the benefit of its commercial interests.

Recommendation 1

The committee recommends that the Minister of Foreign Affairs introduce amendments to the Export and Import Permits Act that explicitly reference respect for internationally recognized human rights and international humanitarian law in section 3(1) of the Act, which sets out the purposes for which exports may be controlled under the Export Control List.

The Minister of Foreign Affairs should also introduce amendments to the Export and Import Permits Act requiring the Minister to consider — in relation to military and strategic goods and technologies on the Export Control List, including goods, technologies and their associated services — whether there is a substantial risk that the exports in question could be used to commit or facilitate serious violations of internationally recognized human rights, serious infringements of the human rights of others by non-state actors, or serious violations of international humanitarian law, when deciding whether to issue a permit under section 7 of the Act.

It should be noted that following Global Affairs Canada's appearance before the committee, a number of Canadian news agencies reported on a video allegedly showing LAVs built in Canada being used by Saudi Arabia against its own citizens.[50] The Minister of Foreign Affairs, Chrystia Freeland, subsequently expressed concern and instructed her officials to "investigate whether the vehicles in the videos were in fact armoured personnel carriers made and exported to Saudi Arabia by Tarradyne Armoured Vehicles, a company based in Newmarket, Ont."[51] During the investigation Global Affairs did not issue permits for arms shipments to Saudi Arabia.[52] On 8 February 2018, the Minister of Foreign Affairs informed the House of Commons Standing Committee on Foreign Affairs and International

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50 Levon Sevunts, "New video purports to show Canadian-made LAVs being used in Saudi Arabia crackdown," *CBC News*, 8 August 2017.

51 Steven Chase and Robert Fife, "Ottawa calls for probe into apparent Saudi use of Canadian-made armoured vehicles against citizens," *The Globe and* Mail, 28 July 2017; The Canadian Press, "Freelend concerned Canadian-made armoured vehicles used against Saudi citizens," *CBC News*, 8 August 2017.

52 Steven Chase, "Federal government hits 'pause button' on approving permits for arms exports to Saudi Arabia," *The Globe and Mail*, 24 January 2018.

Development that the investigation found "no conclusive evidence that Canadian-made vehicles were used in human rights violations."[53]

Concerns were also raised regarding transparency as to where the government obtains its human rights related information to make export permit determinations. Ms. Saperia suggested that greater transparency and clearer standards in the decision-making process could be helpful. This could be done by formalizing a way for civil society and academia to contribute to the Global Affairs Canada's collection of country information regarding human rights and international humanitarian law. This information could then be published by Global Affairs Canada in the form of an annual report and could form a significant part of export permit decisions.[54]

Milos Barutciski, Co-Head of International Trade at the law firm Bennett Jones, argued that the Act itself could require that the Government of Canada, with due diligence, gather information about the level of respect for human rights and international humanitarian law in the country of final destination before an export permit is issued. Mr. Barutciski added that mechanisms to assess the end-use of exports once they leave the country also could be strengthened by attaching conditions to export permits with regard to the use of the goods and the end-user.[55] He noted that "The minister can, and routinely does, attach conditions on permits issued to private exporters."[56] He stressed that under many contracts for capital goods and defence-related technology, much of the profit for a Canadian exporter comes "in the way of spare parts, refurbishment, engineering, upgrades of software … and so on."[57]

Global Affairs Canada explained that many export permits are part of a series that will span a number of years:

> Export permits have a validity that could range from a couple of years to three or four years in some instances. As we know, and is publicly available, the case of the Saudi LAV sale is a multi-year, I believe 14 years, contract. There will be multiple export permits during that time as particular tranches of the contract are delivered. Every permit application would be assessed based on the facts available at the time of application.[58]

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53 House of Commons Standing Committee on Foreign Affairs and International Development, *Evidence*, 1st Session, 42nd Parliament, 8 February 2018 (The Honourable Chrystia Freeland, P.C., M.P., Minister of Foreign Affairs)

54 *Evidence*, 15 June 2016 (Saperia).

55 *Evidence*, 8 June 2016 (Barutciski).

56 *Evidence*, 8 June 2016 (Barutciski). See: *Export Controls Handbook*, August 2017.

57 *Evidence*, 8 June 2016 (Barutciski).

58 *Evidence*, 8 June 2016 (Gilmour).

Not all exports, however, exceed the validity range. These exports would not require subsequent approvals.[59]

Mr. Barutciski suggested that one way to increase accountability for the end-use of Canadian exports would be to attach a condition regarding end-use to the first permit in a series, and "if evidence comes to light that the condition was not satisfied by the purchaser" subsequent permits could be refused.[60] He cautioned, however, against unnecessary or unrealistic conditions that would impose heavy burdens on exporters to "monitor each and every action of a foreign government." [61] A "more sparing use of regulatory instruments" would be preferable, in Mr. Barutciski's view. [62]

The committee notes that the addition of specific clauses regarding end-uses and end-users to export contracts might also provide a potential avenue for Canadian exporters to monitor whether their goods or technologies are being used to commit or facilitate serious violations or abuses of internationally recognized human rights or international humanitarian law.

Ms. Saperia also argued for stronger monitoring of the end-use of Canadian exports and suggested that the Government of Canada could have some responsibility to follow certain high-risk exports for several years to ensure that they are not being used to violate or abuse human rights or international humanitarian law. She also proposed the creation of a mechanism to enable the public "to apply pressure on government, perhaps, to give more feedback about whether Canadian exports are being used improperly and whether a contract ought to be cancelled."[63]

Information regarding impermissible end-uses (or end-users) of the export could then feed back into the approval process for subsequent permits.[64]

Whether the penalties under Canada's export control regime are sufficient to deter companies from circumventing the export permit process was also called into question. Ms. Saperia argued that for the system to work, it has to make business sense. If the fine has a negligible impact on the overall revenue of a company, then it is not a deterrent; the fine simply becomes the cost of doing business.[65] She also pointed out that there are "only a handful of export compliance cases prosecuted by Canada."[66] This may suggest that

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59 *Evidence*, 8 June 2016 (Gilmour).
60 *Evidence*, 8 June 2016 (Barutciski).
61 *Evidence*, 8 June 2016 (Barutciski).
62 *Evidence*, 8 June 2016 (Barutciski).
63 *Evidence*, 15 June 2016 (Saperia).
64 *Evidence*, 8 June 2016 (Barutciski).
65 *Evidence*, 15 June 2016 (Saperia).
66 *Evidence*, 15 June 2016 (Saperia).

enforcement mechanisms and agencies do not have the necessary tools or resources to perform their roles in preventing illegitimate exports.[67]

Overall, as Professor Andrea Charron, Assistant Professor and Deputy Director for Defence and Security Studies, University of Manitoba said, "the more vested interest [banks and private citizens] have to make human rights part of their business model, the more likely sanctions aimed at human rights will be given effect."[68]

The committee believes that Canada's policy of promoting respect for internationally recognized human rights does not end once an export permit has been issued; it continues even when the exported goods and technologies have left the country.

The committee agrees with witnesses that the export permit assessment process under the ECL could be strengthened and updated by creating a formal way for stakeholders, including civil society and academics, to contribute to the collection of information and the development of the tools that Global Affairs Canada uses to assess respect for internationally recognized human rights and international humanitarian law in foreign countries. Stakeholders could also provide information controlled goods and technologies that are being, or are at substantial risk of being, used to commit or facilitate serious violations or abuses of human rights and serious violations of international humanitarian law. The committee believes it would also be valuable for Global Affairs Canada to improve public consultation regarding the general impact of Canadian exports on internationally recognized human rights.

The committee is of the view that Global Affairs Canada should reinforce and update the export permit process by adding conditions to export permits related to end-uses and end-users, and by exploring ways to introduce more effective end-use monitoring mechanisms. Both private exporters and the Government of Canada should have due diligence obligations in this regard. Consideration should be given to embedding due-diligence obligations related to end-uses and end-users in contracts for the export and sale of Canadian military and strategic goods. Care must be taken, however, to ensure that monitoring mechanisms do not impose unrealistic obligations on Canadian exporters.

Recommendation 2

The committee recommends that Global Affairs Canada consult stakeholders, including civil society and academics, in the development of tools used to assess the likelihood and nature of violations of internationally recognized human rights and international humanitarian law in the export

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67 *Evidence*, 15 June 2016 (Saperia).
68 *Evidence*, 1 June 2016 (Charron).

permit application process under the Export Control List in the Export and Import Permits Act.

Recommandation 3

The committee recommends that Global Affairs Canada create opportunities for regular consultations with stakeholders to provide information regarding the human rights situation in various countries, as well as formal channels for stakeholders to submit information regarding the end-uses and end-users of military and strategic goods and technologies on the Export Control List that raise human rights or international humanitarian law concerns.

Recommendation 4

The committee recommends that Global Affairs Canada work with industry representatives, civil society groups, academics and other stakeholders to explore contractual mechanisms and other ways to better monitor the end-use and end-users of military and strategic goods and technologies on the Export Control List that have been exported from Canada. This monitoring should focus on identifying potential serious violations of internationally recognized human rights, serious infringements on the internationally recognized human rights of others by non-state actors, and serious violations of international humanitarian law. The Government of Canada should play a role in this monitoring.

PART 2: New and Emerging Technologies

A. Internet Filtering, Online Monitoring and Human Rights

Some witnesses expressed concern regarding the impact of new and emerging non-military technologies on human rights and international humanitarian law. Witnesses focused their remarks on the deliberate use of new and emerging technologies by states to violate internationally recognized human rights. The committee's discussion of the risks posed by such technologies, therefore, focuses on human rights violations; nonetheless, the committee is cognizant that human security risks may arise in other situations or with respect to other types of end-users.

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

Canada controls the export of military/civilian dual-use goods and technology in line with the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies *(the Wassenaar Arrangement). The Wassenaar Arrangement is a non-binding international arrangement through which participating states agree to control voluntarily the export of a common list of dual-use goods and technologies. Canada has been part of the Wassenaar Arrangement since its inception 1995.*

In December 2013, the Wassenaar Arrangement's list of dual-use goods and technologies was expanded to take account of certain technologies, including intrusion software (described as "surveillance and law enforcement/intelligence gathering tools" in an official press release from the Arrangement). Canada introduced corresponding controls under the EIPA in December 2014).

The committee was informed by Ronald J. Deibert, Professor of Political Science, University of Toronto, Munk School of Global Affairs, Director of the Citizen Lab and Walter Van Holst, Vrijschrift, European Digital Rights that some countries use technology – including software exported from Canada and other Western countries – to control and monitor access to the Internet in order to control speech and the free flow of ideas. These types of controls can have devastating consequences on political opponents, journalists, activists, lawyers and human rights defenders.[69] Professor Deibert explained how two categories of these technologies have been used by repressive governments to violate internationally recognized human rights:

> Turning to the first category of research around deep packet inspection and Internet filtering technologies that private companies can use for traffic management but which can also be

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69 Standing Senate Committee on Human Rights, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016 (Walter Van Holst, Vrijschrift, European Digital Rights); *Evidence*, 30 November 2016 (Deibert).; Above Ground, *Submission by Above Ground to the Standing Senate Committee on Human Rights: The state-business nexus and the export of dual-use technologies*, 16 January 2016 [Above Ground written submission].

> used by Internet service providers to prevent entire populations from accessing politically sensitive information online or be used for mass surveillance. The second category … concerns the use of malicious software, malware billed as a tool for unlawful intercept. In the course of the last few years, we have documented numerous cases of human rights defenders and civil society organizations being targeted with advanced commercial spyware.[70]

Thus, the use of these technologies to restrict Internet freedom can violate not only the right to freedom of expression; it may also lead to arbitrary arrests and detentions as well as violations of the right to privacy and the right to freedom of religion. Furthermore, these technologies can chill individuals' free enjoyment of these rights by making them fearful that their communications or online activities are being monitored.

B. The Human Rights Risks of Canada's Technology Exports

The committee notes that the Government of Canada participates in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies and that this body has made efforts to control the flow of some of these technologies.[71] However, Professor Deibert indicated that the types of technologies often used by repressive regimes to violate human rights were not captured by the Wassenaar Arrangement's expanded list of dual-use goods and technologies.[72] He explained that the technologies not controlled for under the EIPA include Internet filtering and Internet censorship technology as well as "quality of service, deep packet inspection technology, [which] can be used to throttle Internet traffic, to slow down Internet traffic, [and] to prevent access to certain protocols associated with privacy and anonymity network tools."[73]

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70 *Evidence*, 30 November 2016 (Deibert).

71 *Wassenar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* [Wassenar Arrangement], *Public Documents, Volume I – Founding Documents*, 2017 and "List of Dual-Use Goods & Technologies and Munitions List," 7 December 2017. For an overview of the organization, see: Wassenaar Arrangement, *About Us*. Prior to the Wassenaar Arrangement, Canada was part of the Coordinating Committee for Multilateral Export Controls (COCOM). On 9 December 1995, COCOM became the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*. See: Nuclear Threat initiative, *Wassenaar Arrangement*.

72 Wassenaar Arrangement, "Public Statement 2013 Plenary Meeting of The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies," December 2013, implemented by Canada in *Regulation – Order amending the Export Control List (December 2013)* on 4 December 2014 (See: Global Affairs Canada, "Regulation – Order Amending the Export Control List," 11 November 2014). See also the most recent update: Wassenaar Arrangement, "List of Dual Use Goods & Technologies and Munitions List," 7 December 2017, and the accompanying "Summary of Changes: List of Dual-Use Goods & Technologies and Munitions List," 7 December 2017.

73 *Evidence*, 30 November 2016 (Deibert).

The committee was informed that software companies are selling these types of technologies to authoritarian governments who use them expressly to repress dissent within their borders, with the knowledge and active participation of these companies.[74] Mr. Van Holst told the committee that these types of technologies often require post-sale support services, including regular maintenance and updates. As a result, exporting software companies tend to maintain a relationship with their buyers after the sale. According to Mr. Van Holst, these post-sale support services are very valuable to the receiving country.[75]

In the committee's view, post-sale support services offer another opportunity for exporters and the Government of Canada to monitor how these technologies are utilized by end-users, since the exporter will have an on-going relationship with the client. The Government of Canada could, for example, apply conditions to export permits related to such services and terminate export permits if the exported technologies or associated support service are used to commit or facilitate violations or abuses of internationally recognized human rights or serious violations of international humanitarian law.

The committee notes that on 28 September 2016, the European Commission made a proposal to "modernise and strengthen controls on export of dual-use items," which was designed to address several gaps in their current system. According to the written submission received by the committee from the Delegation of the European Union to Canada, under this proposal:[76]

- "The definition of dual-items is revised to include cyber-surveillance technologies explicitly.
- The authorisation control criteria are reviewed to prevent exports where there is a clear risk of human rights violations.
- An EU autonomous list of cyber-surveillance technologies is proposed and the human security end-user control ("catch-all")

The Freedom Online Coalition

Canada is a member of the Freedom Online Coalition, which "is a group of governments who have committed to work together to support Internet freedom and protect fundamental human rights—free expression, association, assembly, and privacy online—worldwide."[1] Members of the Coalition coordinate their diplomatic efforts, share information on violations of human rights online and work together to voice concern over measures that curtail human rights online. The Coalition also collaborates by issuing joint statements, by sharing policy approaches to complex issues, exchanging views on strategy, and planning participation in relevant forums.

At the national level, members of the Coalition are encouraged to engage with domestic companies to discuss human rights challenges faced by the information and communication technology sector.[1] (See: Freedom Online Coalition, About; Government of Canada, Internet Freedom.)

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74 *Evidence*, 30 November 2016 (Deibert); Above Ground, written submission.

75 *Evidence*, 30 November 2016 (Van Holst).

76 European Commission, *Commission proposes to modernise and strengthen controls on exports of dual-use items*, Press release, 28 September 2016.

> for non-listed dual-use items is expanded in order to trigger the application of controls based on a series of cumulative human security criteria."[77]

The proposal would provide new tools to "allow more efficient control over dual-use items, including addressing the proliferation of cyber-surveillance technologies and the risks they pose to international security and to the protection of human rights and digital freedoms in a globally connected world."[78]

The assessment criteria for authorizing applications of listed dual-use items detailed in the Commission's proposal "refer explicitly to respect for human rights in the country of final destination as well as that country's respect of international humanitarian law."[79] The human security criteria listed in the proposal "are intended to limit the application of controls to specific situations and specific technologies. The controls are targeted to persons engaged in specific activities and not to entire destinations or countries."[80]

With regards to new and emerging goods and technologies that have both legitimate uses and uses that could violate or abuse internationally recognized human rights (referred to as "illegitimate" uses), Professor Deibert argued that export controls alone are not sufficient to deter companies from selling software that could be used for illegitimate ends.[81] He suggested that the Government of Canada should encourage the technology industry as a whole to be more transparent about the full range of products and services they sell, and their clients. At a minimum, Professor Deibert argued that the Government of Canada should require companies that provide such technologies to "self identify and report as a matter of public record."[82]

He also stated that private sector should be incentivized to live up to its responsibility to respect human rights. This responsibility is set out in the *United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles)*, which provides that businesses "should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved."[83] The committee notes that this responsibility "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations."[84] Professor Deibert maintained that

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77 Letter from the Delegation of the European Union to Canada to the Honourable Senator Jim Munson, Chair, Standing Senate Committee on Human Rights, 12 April 2017.

78 Ibid.

79 Ibid.

80 Ibid.

81 *Evidence*, 30 November 2016 (Deibert).

82 *Evidence*, 30 November 2016 (Deibert).

83 *Evidence*, 30 November 2016 (Deibert); UN Guiding Principles on Business and Human Rights, principle 11.

84 UN Guiding Principles on Business and Human Rights, commentary to principle 11.

currently, "few, if any, costs [are] incurred by the companies supplying and servicing technologies when such technologies are used to violate human rights."[85]

Professor Deibert also indicated that export permits are only one aspect of the regulatory and policy changes needed to incentivize greater respect for human rights by Canadian businesses. He urged the Government of Canada to take additional measures

> including government procurement and export credit or assistance policies that require dual-use vendors to demonstrate company commitment to human rights due diligence, enhanced consumer protection laws and active efforts at consumer protection agencies to address the misuse of dual-use technologies, a regulatory framework for oversight and accountability specifically tailored to dual-use technologies, and structured dialogue with companies in civil society regarding the establishment of industry self-regulation.[86]

According to Professor Deibert, access to a remedy when dual use products and services are used to violate or abuse internationally protected human rights is also important. He suggested that "Canadian law could ensure that criminal or civil litigation is possible in such circumstances, including through the clear establishment of jurisdiction over actors that operate transnationally or may be state linked."[87]

The committee believes that new and emerging technologies that have both legitimate and illegitimate uses will continue to challenge Canada's export regime. The committee is concerned that the EIPA does not control the export of all such products and services, which means that they are not subject to any sort of risk assessment related to internationally recognized human rights or international humanitarian law. The Act needs to be updated.

The committee believes that the Government of Canada needs to close gaps in Canada's current export regime that allow the sale of Canadian cyber technologies and their associated services to countries or non-state actors that use them to commit or facilitate serious violations or abuses of internationally recognized human rights, or serious violations of international humanitarian law. Since technology changes rapidly, effective controls will need to focus on end-uses and end-users, rather than categories of technology. The committee is of the view that, as a starting point, Canada should incorporate end-use and end-user controls in relation to the export cyber-surveillance technologies and Internet filtering software, as well as associated support services. The recent changes to the European Union's export control regime could provide a model for such changes.

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85 *Evidence*, 30 November 2016 (Deibert).
86 *Evidence*, 30 November 2016 (Deibert).
87 *Evidence*, 30 November 2016 (Deibert).

Recommendation 5

The committee recommends that the Minister of Foreign Affairs introduce amendments to update *the Export and Import Permits Act*, and update the *Export Control List* and the export permit regime with the goal of preventing Canadian technology exports from being made available to any destination where there is a substantial risk that their use could result in the commission or facilitation of serious violations of internationally recognized human rights, serious infringements on the human rights of others by non-state actors, or serious violations of international humanitarian law. The focus of such controls should be on end-uses and end-users, rather than on categories of technology.

Recommendation 6

The committee recommends that Global Affairs Canada review possible avenues to enhance corporate transparency and accountability in relation to the end-uses and end-users of Canadian technology exports that have the potential to be used to violate internationally recognized human rights, to infringe on the human rights of others, or to violate international humanitarian law in the country of final destination

C. Problematic Public Sector Support for Exporters

The committee was told that a Canadian software developer had received support from a Crown corporation to export technology to a state that deliberately used it to violate human rights. Specifically, Above Ground told the committee that in July 2016, Export Development Canada (EDC) provided support to a company called Netsweeper, through a guarantee to the Royal Bank of Canada. The bank then provided financing to support the company's business activity in Bahrain.[88] The company sold software to the Government of Bahrain and, according to Above Ground and Citizen Lab, it was used "to filter content including critical political speech, news websites, human rights content, websites of oppositional political groups, and Shia-related content."[89]

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88 Above Ground written submission, p. 1.

89 Ibid. See also: *Evidence*, 30 November 2016 (Deibert).

Responding to Above Ground's testimony before the committee, Christopher Pullen, Director, Environmental Advisory Services, Export Development Canada informed the committee that EDC "takes seriously the role it has in ensuring human rights are protected in the business it supports."[90]

The committee was informed that EDC's engagement on human rights issues is guided by its Corporate Social Responsibility Advisory Council as well as a number of non-binding international corporate social responsibility standards. Those with a human rights component include: the Organisation for Economic Cooperation and Development (OECD) recommendations on common approaches for officially supported export credits and environmental and social due diligence, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles, the Equator Principles risk management framework for financial institutions, the International Finance Corporation of the World Bank Group's Performance Standards on Environmental and Social Sustainability, and the Voluntary Principles on Security and Human Rights.[91]

Mr. Pullen informed the committee that EDC's consideration of an application for support of a transaction includes evaluating the "company's track record; their corporate, environmental and social risk management policies; their commitments to various domestic and international standards; the guidelines they observe; how they address Canadian law, as well as the laws of the importing countries in which they're planning to operate."[92] The consideration of social and environmental risk management includes human rights. The outcome of this assessment is used to "provide guidance to EDC on the potential customer's performance in these areas, as well as the overarching country risks;" it also informs recommendations on whether EDC should proceed with providing support for a transaction. Mr. Pullen stated that the guarantee to the Royal Bank of Canada in relation to Netsweeper's business in Bahrain is no longer in place. He indicated that the company is no longer a customer of EDC.[93]

EDC states that it considers a range of non-binding international corporate social responsibility standards relating to human rights when it assesses contractual risk. Nonetheless it approved a financial institution's guarantee for financing provided to support Canadian business activity in Bahrain, despite the widespread availability of credible reports indicating that the Government of Bahrain was committing large-scale violations of

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90 *Evidence*, 1st Session, 42nd Parliament, 29 March 2017 (Christopher Pullen, Director, Environmental Advisory Services, Export Development Canada).

91 *Evidence*, 29 March 2017 (Pullen); Export Development Canada, *Business Ethics*; Organisation for Economic Cooperation and Development (OECD), OECD *Guidelines for Multinational Enterprises*, 2011; *UN Guiding Principles on Business and Human Rights*; Equator Principles Association, the *Equator Principles*, June 2013; International Finance Corporation, *Performance Standards on Environmental and Social Sustainability*, 2012; *Voluntary Principles on Security and Human Rights*, 2000.

92 *Evidence*, 29 March 2017 (Pullen).

93 *Evidence*, 29 March 2017 (Pullen).

the right to freedom of expression of its own citizens, as well as various other serious human rights violations.[94]

For example, the Report of the Bahrain Independent Commission of Inquiry (BICI Report) reported in 2011 that Bahraini citizens were being detained and prosecuted in connection with acts protected by the freedoms of expression, association and assembly under international human rights law.[95] As a result, Canada encouraged Bahrain to implement all the recommendations presented in the BICI Report during Bahrain's 2012 Universal Periodic Review before the United Nations Human Rights Council.[96] Canada also recommended that Bahrain "[a]mend the Penal Code to remove all criminal penalties for alleged libel offences and the press law to bring its provisions into compliance with article 19 of ICCPR [International Covenant on Civil and Political Rights]."[97] Canada further recommended that Bahrain "[t]ake steps to develop new legislation and policies for law enforcement officials to guarantee accountability of security forces and respect for human rights."[98] Concerns regarding respect for freedom of expression and association in Bahrain have continued since 2012. During Bahrain's 2017 Universal Periodic Review, for example, Canada recommended that Bahrain "[r]emove undue restrictions on the online publication of news media and the licensing restrictions on media organizations and individuals seeking to practice journalism;" remove criminal penalties for libel and insult offences; remove "undue restrictions on the organization of peaceful protest in opposition to the government, and repeal the application of criminal penalties to peaceful participation in unauthorized protests"; and, remove "restrictive limitations on the establishment of political parties or membership therein and cease the dissolution by law of opposition political societies".[99]

The United Nations Working Group on Business and Human Rights concluded a ten-day visit to Canada on 1 June 2017. In its statement at the end of its visit, the Working Group raised concerns with the transparency of EDC's human rights due diligence process. It recommended that EDC release an annual human rights report with a view to instilling

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94 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," *United Nations Human Rights Office of the High Commissioner*, A/HRC/23/40, 17 April 2013; U.S. Department of State, *Bahrain*, Country Reports on Human Rights Practices for 2015; Morgan Marquis-Boire, "From Bahrain With Love: FinFisher's Spy Kit Exposed?," Citizen Lab Research Brief No. 9, July 2012

95 *Report of the Bahrain Independent Commission of Inquiry*, 23 November 2011, paras. 1279 – 1291.

96 *Report of the Working Group on the Universal Periodic Review: Bahrain*, United Nations Human Rights Council, A/HRC/21/6, 6 July 2012, para. 63. See Report of the Bahrain Independent Commission of Inquiry, paras. 1279 – 1291.

97 *Report of the Working Group on the Universal Periodic Review: Bahrain*, United Nations Human Rights Council, A/HRC/21/6, 6 July 2012, para. 115.153.

98 *Report of the Working Group on the Universal Periodic Review: Bahrain*, United Nations Human Rights Council, A/HRC/21/6, 6 July 2012, para. 115.109.

99 *Report of the Working Group on the Universal Periodic Review: Bahrain*, United Nations Human Rights Council, A/HRC/36/3, 10 July 2017, paras. 114.104, 114.105, 114.121, 114.123.

public confidence in its work.[100] The committee agrees. As a Canadian Crown corporation, Canadians, journalists, civil society organizations and academics should be able to scrutinize EDC's consideration of human rights to enhance public accountability. Involving stakeholders, such as civil society organizations and academics, in an open process could also help raise the quality of EDC's human rights assessments.

The committee is also concerned that EDC does not have a statutory obligation to determine whether a potential transaction in which it will participate could negatively affect respect for human rights or international humanitarian law. The committee notes that section 10.1 (1) of the *Export Development Act*, requires EDC to determine, before entering into a transaction related to a project,[101] "(a) whether the project is likely to have adverse environmental effects despite the implementation of mitigation measures; and (b) such is the case, whether the Corporation is justified in entering into the transaction."[102] The committee believes the *Export Development Act* should be amended to include a similar provision requiring it to consider whether a transaction is likely to result in the commission or facilitation of serious violations or abuses of human rights, or serious violations of international humanitarian law.[103] The committee notes that this analysis should not be limited to serious violations of internationally recognized human rights when EDC supports projects or transactions being undertaken in Canada.

The committee is also concerned that Canadian Crown corporations and financial institutions such as the EDC, the Canadian Commercial Corporation and the Royal Bank of Canada, are not doing enough to align their business practices with the *UN Guiding Principles* in a meaningful way. Adopted by the United Nations Human Rights Council in 2011, the Guiding Principles "are a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations." Canada has supported work to develop the *UN Guiding Principles* since 2005 and "continues to promote and align its efforts with them."[104] The committee observes, however, that the *UN Guiding Principles* offer few disincentives for organizations that do not follow them.[105] The committee believes that withdrawal of export credit support by Crown corporations, as well as the withdrawal of diplomatic and other forms of government support, are likely to motivate Canadian financial institutions and other corporate actors to take steps to ensure

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100 United Nations Human Rights Office of the High Commissioner, *Statement at the end of a visit to Canada by the United National Working Group on Business and Human Rights*, 1 June 2017.

101 "'Project' means a physical development that is or will be greenfield, or a major extension or transformation-conversion thereof, and which in each case is planned or occurring and is industrial-, commercial- or infrastructure-related in nature." A greenfield project is one that is not constrained by previous work. See: EDC, "Environmental and Social Review Directive," p. 12.

102 Export Development Act, R.S.C., 1985, c. E-20, s. 10.1(1).

103 Although this report focuses on EDC's international business, EDC does conduct business in relation to transactions and projects inside Canada. Therefore, the report refers to human rights standards generally, rather than to internationally recognized human rights in relation to EDC.

104 Global Affairs Canada, *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*.

105 *Evidence*, 30 November 2016 (Deibert).

their business activity abroad respects internationally recognized human rights and international humanitarian law. The committee observes that provincial governments could contribute to this goal in areas of provincial jurisdiction.

Recommendation 7

The committee recommends that the Government of Canada, with the provincial and territorial governments, examine possible additional avenues to incentivize Canadian exporters and financial institutions to bring their business practices into compliance with the United Nations *Guiding Principles on Business and Human Rights*, and consider ways to enhance accountability if they fail to do so.

Recommendation 8

The committee recommends that Canadian Crown corporations, including Export Development Canada, take additional steps to ensure their business practices comply with the United Nations *Guiding Principles on Business and Human Rights*.

Recommendation 9

The committee recommends that the Government of Canada introduce amendments to the *Export Development Act* to require that Export Development Canada consider whether there is a substantial risk that a transaction could result in the commission or facilitation of serious violations of human rights, serious infringements on the human rights of others by non-state actors, or serious violations of international humanitarian law; and, where that is the case, whether the risk can be mitigated sufficiently to justify Export Development Canada entering into the transaction.

Recommendation 10

The committee recommends that the Government of Canada introduce amendments to the Export Development Act to require Export Development Canada to report annually, as part of its existing reporting obligations to Parliament, on the way in which it takes human rights and international humanitarian law into account in its risk assessment process.

Export Development Canada's reports to Parliament should also include statistical information on the number of transactions that were denied support due to risks related to human rights and international humanitarian law.

PART 3: Ongoing Developments in Canada's Export Control Regime

The committee is aware that the Government of Canada announced its intention to accede to the *United Nations Arms Trade Treaty* (ATT) and that it tabled the treaty in the House of Commons on 30 June 2016. On 13 April 2017, the Minister of Foreign Affairs tabled Bill C-47, An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments).[106] The bill was amended by the House of Commons Standing Committee on Foreign Affairs.[107]

The aim of the ATT is to "establish the highest possible common international standards for regulating and improving the regulation of conventional arms" as well as to "prevent and eradicate the illicit trade in conventional arms and prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts."[108] The conventional arms covered by the treaty include, for example, small arms and light weapons, armoured combat vehicles, battle tanks, combat aircrafts, warships and missiles, as well as ammunition, munitions, parts and components.[109] If Canada accedes to the ATT, it will be required to block exports of conventional arms if Canada determines that there is an "overriding risk" that the specific conventional arms or items being exported could be used to commit or facilitate "a serious violation of international humanitarian law or international human rights law", following an objective, non-discriminatory assessment of all relevant factors, including mitigating measures.[110] The International Committee of the Red Cross (ICRC) indicates that some countries have interpreted the "overriding risk" standard to mean a "clear" or "substantial risk," which the ICRC considers to be consistent with the objectives of the treaty.[111]

In a response to a question in the House of Commons, the Honourable Chrystia Freeland, Minister of Foreign Affairs, stated that the Government of Canada is "taking steps to

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106 Bill C-47: An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments), 1st Session, 42nd Parliament (as introduced).

107 Bill C-47: An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments), 1st Session, 42nd Parliament (second reading version).

108 Arms Trade Treaty, Art. 1 and Preamble, in force 24 December 2014 (ATT).

109 ATT, Art. 2.

110 ATT, Art. 7. International humanitarian law is a specialized body of international law that regulates armed conflict.

111 International Committee of the Red Cross, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria, A Practical Guide*, 2016, p. 12.

further enhance the rigour and transparency of export controls."[112] This latter commitment was reiterated in the 2017 federal budget, which stated:

> In 2017, Canada will also join the international Arms Trade Treaty. This agreement ensures that countries have effective systems in place to control the international trade of weapons so that they are not used to support terrorism, organized crime, gender-based violence or human rights abuses. Budget 2017 proposes to invest $13 million over five years to allow Canada to implement this treaty and further strengthen its export control regime.[113]

In order to allow Canada to accede to the ATT, Bill C-47 amends the EIPA in a number of ways. In particular, when issuing an export permit in respect of arms, ammunition, implements or munitions of war, the Minister will be required to consider whether the goods or technology in question could be used to commit or facilitate a serious violation of international humanitarian law, a serious violation of international human rights law, offences under international terrorism or transnational organized crime conventions to which Canada is a party, serious acts of gender-based violence or serious acts of violence against women and children. Where there is a substantial risk of such consequences, the Minister may not issue the export permit.[114] The bill also includes new record-keeping requirements and the power to inspect, audit or examine the records of persons and organizations that have applied for export permits under the EIPA.[115] In addition, the Minister will be required to table a report on military exports and operations under the Act in both Houses of Parliament by 31 May of each year.[116] The committee observes that these amendments offer an opportunity to address some of the weaknesses in Canada's export control system highlighted by witnesses relating to internationally recognized human rights and international humanitarian law.

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112 House of Commons, *Sessional Paper: 8555-421-641*, 1st Session, 42nd Parliament, 30 January 2017, Q-641.

113 Government of Canada, "Building a Stronger Middle Class: # Budget2017," 22 March 2017, p. 183.

114 Bill C-47: An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments), 1st Session, 42nd Parliament, clause 8 (enacting new sections 7.3 and 7.4).

115 Ibid., clauses 10–11 (amending section 10 of the Act) (second reading version).

116 Ibid., clause 21

CONCLUSIONS

The committee is pleased that the Government of Canada has acknowledged the need to toughen the export permit process. However, it appears to the committee that the Government of Canada's actions on exports are not always consistent with its stated support for human rights. While the committee recognizes that multiple, complex considerations must be weighed in the context of export permit applications, it is troubled by the lack of transparency applied to the consideration of human rights and international humanitarian law in the current process.

The committee is very concerned that the Government of Canada has supported companies that are contributing to human rights violations abroad through its Crown corporations. In the committee's view, Crown corporations such as the EDC and the CCC need to take immediate action to closely align their business practices with the United Nations Guiding Principles on Business and Human Rights. The Government of Canada must also work with its provincial counterparts to strengthen corporate social responsibility in the private sector. Canadian companies should not profit from human suffering.

The committee believes that Canada's export control regime must be strengthened and updated. Export controls should play a key role in Canada's implementation of its obligations under international human rights law and international humanitarian law; such controls should also be an integral part of Canada's commitment to upholding non-binding human rights standards like the United Nations Guiding Principles on Business and Human Rights.

To accomplish these goals, the entire export controls system needs to give greater weight to consideration of risks related to internationally recognized human rights and international humanitarian law. In particular, references to internationally recognized human rights and international humanitarian law need to be included in the EIPA itself, including as mandatory considerations before permits can be issued for the full range of controlled exports; mechanisms to monitor end-uses and end-users of controlled Canadian exports by the Government of Canada and exporters needs to be reinforced and updated; and, gaps in existing export controls need to be filled in order to cover new and emerging technologies that pose serious human rights and humanitarian law risks.

Appendix 1: List of Recommendations

Recommendation 1

The committee recommends that the Minister of Foreign Affairs introduce amendments to the Export and Import Permits Act that explicitly reference respect for internationally recognized human rights and international humanitarian law in section 3(1) of the Act, which sets out the purposes for which exports may be controlled under the Export Control List.

The Minister of Foreign Affairs should also introduce amendments to the Export and Import Permits Act requiring the Minister to consider — in relation to military and strategic goods and technologies on the Export Control List, including goods, technologies and associated services — whether there is a substantial risk that the exports in question could be used to commit or facilitate serious violations of internationally recognized human rights, serious infringements of the human rights of others by non-state actors, or serious violations of international humanitarian law, when deciding whether to issue a permit under section 7 of the Act.

Recommendation 2

The committee recommends that Global Affairs Canada consult stakeholders, including civil society and academics, in the development of tools used to assess the likelihood and nature of violations of internationally recognized human rights and international humanitarian law in the export permit application process under the *Export Control List* in the *Export and Import Permits Act*.

Recommendation 3

The committee recommends that Global Affairs Canada create opportunities for regular consultations with stakeholders to provide information regarding the human rights situation in various countries, as well as formal channels for stakeholders to submit information regarding

the end-uses and end-users of military and strategic goods and technologies on the *Export Control List* that raise human rights or international humanitarian law concerns.

Recommendation 4

The committee recommends that Global Affairs Canada work with industry representatives, civil society groups, academics and other stakeholders to explore contractual mechanisms and other ways to better monitor the end-use and end-users of military and strategic goods and technologies on the *Export Control List* that have been exported from Canada. This monitoring should focus on identifying potential serious violations of internationally recognized human rights, serious infringements on the internationally recognized human rights of others by non-state actors, and serious violations of international humanitarian law. The Government of Canada should play a role in this monitoring.

Recommendation 5

The committee recommends that the Minister of Foreign Affairs introduce amendments to update *the Export and Import Permits Act*, and update the *Export Control List* and the export permit regime with the goal of preventing Canadian technology exports from being made available to any destination where there is a substantial risk that their use could result in the commission or facilitation of serious violations of internationally recognized human rights, serious infringements on the human rights of others by non-state actors, or serious violations of international humanitarian law. The focus of such controls should be on end-uses and end-users, rather than on categories of technology.

Recommendation 6

The committee recommends that Global Affairs Canada review possible avenues to enhance corporate transparency and accountability in relation to the end-uses and end-users of Canadian technology exports that have the potential to be used to violate internationally recognized human rights, to

infringe on the human rights of others, or to violate international humanitarian law in the country of final destination.

Recommendation 7

The committee recommends that the Government of Canada, with the provincial and territorial governments, examine possible additional avenues to incentivize Canadian exporters and financial institutions to bring their business practices into compliance with the United Nations *Guiding Principles on Business and Human Rights*, and consider ways to enhance accountability if they fail to do so.

Recommendation 8

The committee recommends that Canadian Crown corporations, including Export Development Canada, take additional steps to ensure their business practices comply with the United Nations *Guiding Principles on Business and Human Rights*.

Recommendation 9

The committee recommends that the Government of Canada introduce amendments to the *Export Development Act* to require that Export Development Canada consider whether there is a substantial risk that a transaction could result in the commission or facilitation of serious violations of human rights, serious infringements on the human rights of others by non-state actors, or serious violations of international humanitarian law; and, where that is the case, whether the risk can be mitigated sufficiently to justify Export Development Canada entering into the transaction.

Recommendation 10

The committee recommends that the Government of Canada introduce amendments to the *Export Development Act* to require Export Development Canada to report annually, as part of its existing reporting obligations to Parliament, on the way in which it takes human rights and international humanitarian law into account in its risk assessment

process. Export Development Canada's reports to Parliament should also include statistical information on the number of transactions that were denied support due to risks related to human rights and international humanitarian law.

Appendix 2: Memorandum for Action to the Minister of Foreign Affairs*

Global Affairs Canada / Affaires mondiales Canada

approved pour le ministre des Affaires étrangères
2. IV. 2016

SECRET

MAR 2 1 2016
BPTS 00013-2016

MEMORANDUM FOR ACTION

TO:	The Minister of Foreign Affairs
CC:	The Minister of International Trade The Minister of International Development
SUBJECT:	Export of light armoured vehicles and weapon systems to Saudi Arabia

SUMMARY:

General Dynamics Land Systems Canada (GDLS-C) is applying for six permits to export a total of [redacted] light armoured vehicles (LAVs) and associated weapon systems, spare parts and technical data to the Kingdom of Saudi Arabia. Your decision is being sought as an exceptional measure due to the public profile and value of these proposed export permits.

Since 1993, GDLS-C has been granted export permits by the Government of Canada for nearly 3,000 armed LAVs to Saudi Arabia. The applications under consideration are in support of the new, up to $14-billion contract with the Canadian Commercial Corporation for the provision of LAVs to the Saudi Arabi[redacted]

These applications have been fully consulted. Consultation partners advise that these proposed exports are consistent with Canada's defence and security interests in the Middle East. Consultees do not believe that, based on the information available, these exports would be used to commit human rights violations.

The views and recommendation of the Minister of International Trade were sought via a separate memorandum, on which you were copied, on December 21, 2015.

As the conflict in Yemen has continued to evolve, this memorandum also takes into account allegations of human rights abuses by the parties to this conflict, including those contained in the Report of the UN Panel of Experts on Yemen released on February 23, 2016, as well as recent media reports of Canadian made weapons falling into rebel force hands in Yemen.

RECOMMENDATION:

- That the six permits to export [redacted] LAVs and their associated weapon systems, spare parts and technical data to Saudi Arabia be approved.

Daniel Jean
Deputy Minister of Foreign Affairs

☐ I wish to discuss
☑ I concur ☐ I do not concur

Minister

Canada

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* Official version available in English only.

BACKGROUND:

1. Under the *Export and Import Permits Act* (EIPA), the Minister of Foreign Affairs has the authority to issue permits for the export of items on Canada's Export Control List (ECL). In practice, departmental officials approve almost all permit applications on behalf of the Minister. Ministerial decisions are sought when officials are unable to reach a consensus on a proposed export, or if the recommendation is to deny the permit. As an exceptional measure, a ministerial decision may also be sought in cases where no concerns have been raised about a proposed export, if one or more assistant deputy ministers believe there are reasons for doing so.

2. General Dynamics Land Systems Canada (GDLS-C) is a London, Ontario-based company that specializes in the production of military vehicles, and is part of the Combat Systems business group of the U.S.-owned General Dynamics Corporation. GDLS-C has approximately 2,100 employees across Canada, with most located in southern Ontario where it is a major employer. Its principal product is the light armoured vehicle (LAV) series of wheeled armoured fighting vehicles, which are used by the Canadian Armed Forces, and which GDLS-C has exported to several countries worldwide, including the United States, Saudi Arabia, New Zealand, Colombia and Peru. While the company's annual revenues are not publicly available, over the past 25 years GDLS-C has had orders in excess of $30 billion for its products. GDLS-C anchors Canada's defence industry cluster in southern Ontario, and supports a supply chain of over 500 Canadian firms, including small and medium-sized enterprises, across Canada.

3. Following the Iraqi invasion of Kuwait in 1990, Canada deployed naval, air and ground forces to participate in the U.S.-led coalition to protect Saudi Arabia. In the years following, when the Saudis began to rearm in response to the continuing threat from Iraq and a resurgent and increasingly bellicose Iran, the LAVs produced by GDLS-C became a preferred choice to equip the Saudi military's light, mobile formations. From 1993 to July 2015, the Government of Canada granted GDLS-C permits to export a total of more than 2,900 LAVs and their associated weapons systems (including automatic cannon, assault guns, mortars and anti-tank missiles) and spare parts in more than a dozen different configurations to equip Saudi regular and National Guard forces (including approximately 500 vehicles built under licence from the Swiss firm Mowag prior to 1993). Canadian sales of controlled military goods to Saudi Arabia since 1993 have amounted to approximately $2.5 billion. Sales of LAVs and their associated weapon systems have accounted for approximately 90 per cent of this total.

4. These earlier programs were arranged between Saudi Arabia and the U.S. government under the U.S. Foreign Military Sales program and awarded to GDLS-C by the Canadian Commercial Corporation (CCC). The 1956 Canada-U.S. Defence Production Sharing Agreement requires that the CCC administer U.S. Department of Defense purchases from Canada when their value is greater than US$150,000.

5. The six new permit applications currently under consideration total approximately $11 billion and have been submitted by GDLS-C in support of the new [redacted] contract signed in 2014 between the CCC and the Government of Saudi Arabia. The Government of Saudi Arabia decided in this instance to contract directly with Canada, rather than using the U.S. Foreign Military Sales route. The U.S. government supports this new program, and has issued the necessary export authorization to GDLS-C for the U.S.-origin parts and technology included in the LAVs. The Government of Saudi Arabia will be [redacted] and may sue for damages in the event of breach of contract.

6 The current applications encompass a total of [redacted] LAVs, their associated weapon systems (including [redacted]), spare parts, upgrade kits for Saudi Arabia's older fleet of LAVs, and technical data. Deliveries are scheduled to begin [redacted]. GDLS-C has already applied for and received two export permits pertaining to the [redacted] program, these were for the export of technology only (i.e. no goods) valued at a total of $150,000, and were issued in December 2014 and March 2015, respectively. Should these permits be approved, there will be additional permits [redacted] required for support, maintenance and spare parts.

7 Notwithstanding the long history of Canadian defence exports to Saudi Arabia and the fact that GDLS-C has never been denied a permit for any such export, the Department is seeking ministerial approval for these permits. This exceptional measure is warranted by the high public profile and dollar value of these proposed exports. This is consistent with the departmental practice for the handling of sensitive export permit applications where assistant deputy ministers may have reached a consensus on a recommendation to approve an application, but believe that there are other reasons for referring the decision to the Minister of Foreign Affairs.

CONSIDERATIONS:

8 In reviewing this permit application, the Department's Europe and Middle East Branch, the International Security Branch and the International Business Development Branch, as well as the Department of National Defence and Innovation, Science and Economic Development Canada, were consulted. No concerns were raised. Their responses have been appended in Annex A and are summarized below.

9 Saudi Arabia is a key partner for Canada, and an important and stable ally in a region marred by instability, terrorism and conflict. Saudi Arabia is also Canada's largest two-way trading partner in the Middle East and North Africa region. It has the world's largest oil reserves and is currently the world's third largest oil producer. In 2014, two-way merchandise trade was recorded at $3.9 billion. Canada appreciates Saudi Arabia's role as a regional leader promoting regional security and stability, as well as countering the threat posed by Iranian regional expansionism and by ISIS.

10. However, Canada, like others in the international community, remains concerned about human rights issues in Saudi Arabia, including the reported high number of executions, suppression of political opposition, the application of corporal punishment, suppression of freedom of expression, arbitrary arrest, ill-treatment of detainees, limitations on freedom of religion, discrimination against women and the mistreatment of migrant workers. Canada maintains and values our candid dialogue with Saudi Arabia on a number of issues, including human rights. Canadian officials engage regularly with Saudi officials, including the Saudi Human Rights Commission, to raise issues of concern when necessary.

11. Canada's long-standing defence relationship was cemented during the Iraqi invasion of Kuwait. For the past quarter century, Canada, along with the United States and our principal European allies, has encouraged Saudi Arabia to acquire the means to defend itself against neighbours like Iran and their various proxies. For Canada, this support has generally taken the form of providing access to conventional military equipment for light ground forces. GDLS-C, as the principal manufacturer of armoured vehicles in Canada, is a world leader in this sector.

12 From a national defence and trade promotion perspective, GDLS-C is an important supplier to the Canadian Armed Forces, and the export of these vehicles is key to ensuring a strong and viable defence industrial base in Canada. These exports represent a major success in Canada's efforts to assist in opening markets for Canadian defence suppliers and will benefit the Canadian Armed Forces by providing economies of scale for production and technical developments. While defence relations between Canada and Saudi Arabia are limited, they are positive and Saudi Arabia is a key military ally supporting international efforts to counter ISIS in Iraq and Syria as well as countering instability in Yemen. The acquisition of state-of-the-art armoured vehicles will assist Saudi Arabia in these goals, which are consistent with Canada's defence interests in the Middle East.

13 From an economic impact perspective, GDLS-C has an extensive history with the Department's Trade Commissioner Service, and is very active internationally, with 85 percent of its revenue coming from exports. This contract will support General Dynamics investment in Canada, as well as GDLS-C's network of suppliers. The contract will create and sustain thousands of high-quality manufacturing jobs across Canada, providing economic benefit to the Canadian-based supply chain and broader Canadian industry.

Analysis

14 These exports are assessed to be consistent with Canada's overall foreign policy priorities and objectives for the country and region concerned. Saudi Arabia does not pose a threat to the security of Canada or our allies. The proposed exports are assessed to be consistent with Canada's international and regional security interests, as Saudi Arabia is involved in a conflict to address legitimate threats to its own security, as well as address broader regional and international instability of direct concern to Canada.

15 However, as noted above, Canada has had, and continues to have, concerns with Saudi Arabia's human rights record. A key determinant in assessing export permit applications against human rights concerns is whether the nature of the goods or technology proposed for export lends itself to human rights violations, and whether there is a reasonable risk that the goods might be used against the civilian population. The Department is not aware of any reports linking violations of civil and political rights to the use of the proposed military-purposed exports. Based on the information provided, we do not believe that the proposed exports would be used to violate human rights in Saudi Arabia. Canada has sold thousands of LAVs to Saudi Arabia since the 1990s, and, to the best of the Department's knowledge, there have been no incidents where they have been used in the perpetration of human rights violations.

16 Over the past several months there have been a number of articles in mainstream media outlets concerning Canadian sales of LAVs to Saudi Arabia. One of the questions posed by journalists pertains to the role of Canadian-made Saudi LAVs during the upheavals in Bahrain in 2011. Saudi Arabia provided support to Bahrain during these events under the auspices of the Gulf Cooperation Council's "Peninsula Shield." To the best of the Department's knowledge, Saudi troops were stationed to protect key buildings and infrastructure, and did not engage in suppression of peaceful protests.

17 In recent months, airstrikes by the Saudi-led coalition and, to a lesser extent, actions by the Houthi/Saleh forces in Yemen have been criticised by NGOs, including Amnesty International and Human Rights Watch and more recently by the UN due to the high civilian toll. The final UN Panel of Experts on Yemen report released on February 23, 2016, notes that all parties to the ongoing conflict in Yemen, including Saudi Arabia, have violated international

humanitarian law, including by intentionally targeting civilians and attacking humanitarian organizations. The report's allegations against Saudi Arabia pertain to the use of aerial bombardment, indiscriminate shelling, and the use of artillery rockets against civilian areas. The Panel also observed that the Coalition has supplied weapons to resistance forces without appropriate measures to ensure accountability. There has been no indication that equipment of Canadian origin, including LAVs, may have been used in acts contrary to international humanitarian law. The Panel members faced challenges in compiling the report and were not able to visit Yemen to obtain first-hand information. For its part, the Saudi-led coalition has issued a statement emphasizing their respect for and compliance with the rules of international humanitarian and human rights laws and the commitment of their military personnel to those rules. Additionally, on January 31, 2016, the Saudi-led coalition has announced the formation of an independent team of specialists to assess and verify incidents of civilian casualties, to issue clear and objective reports of such incidents, and to draw the necessary conclusions and recommendations concerning future procedures to avoid civilian casualties.

18. The media has also reported on the appearance of a Canadian-made weapon (LRT-3 sniper rifle) photographed in the hands of a Houthi fighter in Yemen. More than 1,300 sniper rifles have been exported from Canada to Saudi Arabian military and security forces under valid export permits, including several hundred of this model. Canada's Embassy in Riyadh assesses that this rifle, along with other Saudi military equipment, was likely captured from Saudi forces by Houthi fighters during military operations along the Saudi-Yemeni border. Reports drawn from open sources indicate that raids along the Saudi border by Houthi/Saleh forces have led to more than 370 deaths, the majority incurred by Royal Saudi Land Forces and border guards, along with the capture of equipment, weapons and ammunition. This type of battlefield loss of equipment is to be expected as a result of military operations. Canada's Embassy in Riyadh remains in contact with Saudi authorities to facilitate the exchange of information on such losses.

19. Taking all of the above factors into consideration, the Department recommends that these permits to export [redacted] LAVs and their associated weapon systems, spare parts and technical data to Saudi Arabia be approved. The Assistant Deputy Minister Review Committee unanimously supports this recommendation.

20. The views and recommendation of the Minister of International Trade were sought via separate memorandum, on which the Minister of Foreign Affairs was copied on December 21, 2015).

RESOURCE IMPLICATIONS:

21. Nil.

COMMUNICATIONS IMPLICATIONS/ACTIONS:

22. Media scrutiny around the Canadian Commercial Corporation-facilitated sales of LAVs to Saudi Arabia is expected to continue. While the Department does not comment on individual permit applications due to commercial confidentiality, responsive media lines concerning the overall contract, as announced by Government in 2014, and Canada's export controls process will continue to be prepared by the Department in consultation with relevant other government departments.

 SECRET

PARLIAMENTARY IMPLICATIONS/ACTIONS:

23. In light of the intense media scrutiny of the GDLS-C contract facilitated by the Canadian Commercial Corporation to provide Saudi Arabia with LAVs, Question Period notes have been prepared and will be updated, as necessary.

ANNEX A

RESPONSES TO CONSULTATION

Note: In order to ensure that you have access the views expressed by all consultation partners, the following inputs are provided for your information.

Department of National Defence

Analysts from the Department of National Defence (DND) have reviewed the export permit applications pertaining to General Dynamics Land Systems Canada's (GDLSC) export of light armoured vehicles (LAVs) and associated weapons systems to the Kingdom of Saudi Arabia in support of the Saudi [redacted] Program. From a defence industrial base perspective, GDLS-C is an important supplier to DND/Canadian Armed Forces, as it builds and maintains Canada's fleet of Coyote, Bison, LAV III, and LAV 6.0 armoured vehicles. DND views the export of these world-class products as a key part of ensuring a strong and viable defence industrial base in Canada. The sale also enlarges the number of countries operating GDLS-C's armoured vehicles, which benefits the entire user-group. These exports also represent a major success in Canada's efforts to assist in opening markets for Canadian defence suppliers, therefore, from a defence industrial base perspective, DND supports these LAV exports to Saudi Arabia. From a defence policy perspective, defence relations between Canada and Saudi Arabia are positive, yet limited. Saudi Arabia is a key Western military ally in the Middle East and supports international efforts to counter ISIS in Iraq and Syria as well as counter instability in Yemen. The acquisition of state-of-the-art armoured vehicles will assist Saudi Arabia in combatting instability in the region, a goal which is consistent with Canada's defence interests in the Middle East.

Global Affairs Canada

Middle East and Maghreb Bureau
The Kingdom of Saudi Arabia is a key partner for Canada. It is an important and stable ally in a region marred by instability, terrorism and conflict. Saudi Arabia is also Canada's most important two-way trading partner in the Middle East and North Africa region. It has the world's largest oil reserves and is currently the world's third largest producer. In 2014, two-way merchandise trade was recorded at $3.9 billion. Canada appreciates the Kingdom's role as a regional leader promoting regional security and stability, as well as countering the threat posed by Iranian regional expansionism and by ISIL. Canada, like others in the international community, is concerned about human rights issues in the Kingdom, including the reported high number of executions, suppression of political opposition, the application of corporal punishment, suppression of freedom of expression, arbitrary arrest, ill-treatment of detainees, limitations on freedom of religion, discrimination against women and the mistreatment of migrant workers. Canada maintains and values our candid and respectful dialogue with Saudi Arabia on a number of issues, including human rights. Canadian officials engage regularly with Saudi officials, including the Saudi Human Rights Commission to raise issues of concern when necessary.

In recent months, airstrikes by the Saudi-led coalition and, to a lesser extent, actions by the Houthi/Saleh forces in Yemen have been criticised by NGOs including Amnesty International and Human Rights Watch and more recently by the UN due to the high civilian toll. The final UN Panel of Experts on Yemen report released on February 23, 2016, notes that all parties to the ongoing conflict in Yemen, including Saudi Arabia, have violated international humanitarian law,

including by intentionally targeting civilians and attacking humanitarian organizations. There has been no indication that equipment of Canadian origin, including LAVs, may have been used in acts contrary to international humanitarian law.

We are not aware of any reports linking violations of civil and political rights to the use of the proposed military-purposed exports. With respect to this specific export permit, based on the information provided, we do not believe that the proposed export would be used to violate human rights in Saudi Arabia. Canada has sold thousands of LAVs to Saudi Arabia since the 1990s and, to the best of the Department's knowledge, there have been no incidents where they have been used in the perpetration of human rights violations. Canada is one of many Western exporters of military goods to Saudi Arabia. To the best of the Department's knowledge, the Government of Saudi Arabia does not have a record of serious violations of human rights of its citizens by use of such goods. Therefore we have no concerns with this export application.

Defence and Security Relations Division (IDR)
In regards to the export of LAVs and associated weapons systems to the Kingdom of Saudi Arabia (KSA), IDR has no objections to the proposed exports. The exports will help support an anti-ISIS Coalition partner in the region and will strengthen a regional power which acts as a check against Iranian influence. Therefore, the export is consistent with the Government of Canada's overall foreign policy priorities and objectives for the country and region concerned.

As well, the KSA does not pose a threat to the security of Canada or our allies and does not have sanctions posed against it. Since 2009, the United States has exported US$46 billion in military equipment to Saudi Arabia, its largest market during that timeframe.

Given that ISIS is a potential threat to KSA and the general potential threat of Iran, Canada can consider that the KSA is facing legitimate threats.

Having reviewed the application and considering the issues above, IDR is of the view that the proposed export will not/not be detrimental to regional security and has no specific concerns with issuing the export permit.

Aerospace, Automotive, Defence and ICT Practices Division
GDLS-C has an extensive history with the Trade Commissioner Service globally (58 services delivered since 2013). The company is part of U.S. General Dynamics Land Systems, which is part of the Combat Systems business group of General Dynamics Corporation. GDLS-C has 2,100 employees across Canada, with the majority in London, Ontario, where it is one of the most important employers. GDLS-C's annual revenues are not publicly available, but orders over the last 25 years are in excess of $30 billion. GDLS-C is very active internationally, with 85 percent of its revenue coming from exports. GDLS-C anchors Canada's land vehicle defence industry cluster in southern Ontario, and supports a supply chain of over 500 Canadian firms, including small and medium-sized enterprises, across Canada. This high value and long-duration contract will support GDLS-C's Canadian suppliers, creating and sustaining high-quality manufacturing jobs across Canada.

Innovation, Science and Economic Development Canada

Aerospace, Defence and Marine Branch

General Dynamics Land Systems Canada (GDLS-C), based in London, Ontario, is the largest Canadian defence company, producing wheeled light armoured vehicles (LAVs) for defence markets. It provides these LAVs to customers as an integrated land defence platform, along with associated systems, typically through government-to-government contractual arrangements.

GDLS-C exports the majority of its production and is also the export leader in the Canadian defence industry. The company's business activities support a substantial supply chain of Canadian manufacturers and service providers, particularly in southwestern Ontario. It is also an important equipment and service provider for the Department of National Defence.

The Kingdom of Saudi Arabia (KSA) has been a long-term key purchaser of LAVs. In February 2014, then-Minister of International Trade Fast announced a major GDLS-C contract to supply the KSA. This KSA procurement opportunity will provide the company with a dependable, long-term, multi-year contract and significant revenues, which supports its competitiveness, innovation activities, and employment in the southwestern Ontario region and across Canada. The particular opportunity for the export of [redacted] LAVs through a Canadian Commercial Corporation-brokered contract to the Saudi [redacted] over four years is high value, estimated at over $11 billion. Also included as part of the proposed export are armaments, [redacted]

These exports would be of substantial economic benefit to Canada and provide significant commercial benefit to the company, as well as to the supply chain and broader Canadian industry.

Appendix 3: Witnesses

Wednesday, June 1, 2016

Cesar Jaramillo, Executive Director (Project Ploughshares)

Ken Epps, Policy Advisor, Project Ploughshares (As an individual)

Belkis Wille, Yemen and Kuwait Researcher (Human Rights Watch)

Andrea Charron, Assistant Professor and Deputy Director, Centre for Defence and Security Studies, University of Manitoba (As an individual)

Wednesday, June 8, 2016

Wendy Gilmour, Director General, Trade Controls Bureau (Global Affairs Canada)

Dominic Gingras, Director, Market Access and Trade Remedies, Law Division (Global Affairs Canada)

Milos Baruteiski, Co-Head of International Trade, Bennett Jones Law Firm (As an individual)

Wednesday, June 15, 2016

Sheryl Saperia, Director of Policy (Canada) (Foundation for Defense of Democracies)

Wednesday, November 30, 2016

Ronald J. Deibert, Professor of Political Science (University of Toronto, Munk School of Global Affairs)

Walter Van Holst, Vrijschrift (European Digital Rights)

Wednesday, March 29, 2017

Christopher Pullen, Director, Environmental Advisory Services (Export Development Canada)